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IN THE

Supreme Court of the United States

No.

LITTLE MOTOR COMPANY,

Petitioner,

vs.

BRENDA LEE SUITS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented is:

1. Can the Court of Appeals impose its opinion of the evidence, in place of a jury's, when the jury finds no intent to defraud and awards a verdict that speaks so.

2. That the Court of Appeals for the Fifth Circuit has wrongfully construed the ruling of the Court of Appeals for the Fourth Circuit in the case of *Ryan v. Edwards,* 592 F.2d 756 (1979).

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LITTLE MOTOR COMPANY petitions this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the case of *Brenda Lee Suits vs. Little Motor Company,* No. 79-488. The judgment from the United States Court of Appeals for the Fifth Circuit, Unit B, was rendered on the 17th day of April, 1981, and there was no Motion for Rehearing.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, Unit B, has been reported, and is attached hereto as Appendix "A". In addition, for further

clarification, the Order of the United States District Court for the Northern District of Georgia is attached hereto as Appendix "B".

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit reversed the trial court, and the Appellee therein petitions this Court for the Writ of Certiorari based upon the jurisdiction of this Court's ability to review by Certiorari a judgment of the United States Court of Appeals. (U.S.C. §1254 (1)).

FEDERAL ACTS INVOLVED

The Motor Vehicle Information and Cost Savings Act of 1972 (15 U.S.C. §1981, et seq.) is involved with emphasis placed on §1989(a), to-wit:

> (a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of
>
> (1) three times the amount of actual damages sustained or $1,500, whichever is the greater; and
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

STATEMENT OF THE CASE

This case involves a sole proprietor of a Used Car Lot and his compliance with the aforementioned Motor Vehicle

Information and Cost Savings Act of 1972 (15 U.S.C. §1981, et seq.).

Petitioner, LITTLE MOTOR COMPANY, sold a 1967 Chevrolet Automobile to BRENDA SUITS in 1977 for the sales price of $6[illegible].00. The automobile had registered 000,073 miles on the odometer and Petitioner, upon sale, marked "unknown" on the odometer disclosure statement in both statutorily required places.

The Judge of the Northern District Court of Georgia, Atlanta Division, upon filing of the Motion for Summary Judgment by Plaintiff, BRENDA SUITS, ruled there was a genuine issue of material fact and upon the trial of the case denied Motions for Directed Verdict as well as Judgment N.O.V. The verdict returned was for the Defendant, LITTLE MOTOR COMPANY, and, as such, implicitly found Petitioner had evidenced no intent to defraud. Plaintiff, upon the entering of the unfavorable verdict, appealed to the U. S. Court of Appeals for the Fifth Circuit and that Court reversed the District Court.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT

Petitioner contends that the Court of Appeals for the Fifth Circuit has erred in its determination that there was *no* genuine material issue of fact. The Court of Appeals reversed the District Court holding there was "manifest[ed] intent to defraud", and further held the trial court should have granted Plaintiff's Motions for Summary Judgment, Directed Verdict, and Judgment N.O.V.

Petitioner LITTLE disagrees with that ruling and makes this his Petition for Writ of Certiorari to the Supreme Court to review the findings and correct the errors of law.

The Court of Appeals for the Fifth Circuit, in its opinion cited several cases as authority for its ruling. Certain of these involve the test for granting or denying the above enumerated Motions. The Appeals Court, citing *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir., 1969) (en banc), determined there was "not substantial evidence" on behalf of LITTLE MOTOR COMPANY. Petitioner submits the Court of Appeals is substituting its opinion of the evidence for that of the trial court judge and the jury. In fact, *Boeing,* supra, at page 375 reads: ". . . it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of the witnesses". It is interesting that in *Boeing,* supra, the case was allowed to go to the jury over Motions for Directed Verdict and Judgment N.O.V. Petitioner submits the questions presented for trial contain sufficient evidence in which the jury could find for the Defendant, LITTLE.

The Appeals decision analyzed *Ryan v. Edwards,* 592 F.2d 756 (4th Cir., 1979), and found, as relates to the Appeal, it to be "precise situation" before them. Petitioner disagrees! In *Ryan,* supra, the automobile involved was a four (4) year old car that had been advertised in the newspaper by the seller as "low mileage. . . pampered family car". Further, as the testimony disclosed, the seller, Ryan, had told the purchaser the odometer was damaged (it read 013,175 miles) and there was approximately 32,000 miles on it, and completed the fraud by giving the buyer an odometer disclosure form completed with 13,175 miles on it. Ryan's jury, and rightfully so, held there was an intent to defraud.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

Brenda Lee SUITS, Plaintiff-Appellant,

v.

LITTLE MOTOR COMPANY,
Defendant-Appellee.

No. 79-3488.

United States Court of Appeals,
Fifth Circuit.
Unit B

April 17, 1981.

Before TUTTLE, TJOFLAT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

The question posed here is whether, under the Motor Vehicle Information and Cost Savings Act [the Act],[1] the sale of a car by a transferor who knows that the odometer has "turned over," i.e., recorded 99,999 miles and returned to 0, and fails to so indicate, manifests an intent to defraud. We hold that it does and that the transferor is therefore liable under the Act.

Appellant Brenda Lee Suits bought a car from appellee Little Motor Company [Little Motor] on June 14, 1977. The vehicle's odometer showed 73 miles. Little Motor had purchased the vehicle some ten days earlier from Leiphart Chevrolet, at which time Leiphart had provided Donald Little, Little Motor's owner, with a mileage disclosure form warranting the mileage as 100,073 miles. Little, following

[1] 15 U.S.C. §1981 *et seq.*

his customary practice, arranged to have these papers mailed to him and immediately placed the car on his lot for sale. When Suits purchased it, the papers had not yet arrived.[2] In purported compliance with the Act, Little provided Suits with a mileage disclosure form completed as follows:

> I, Little Motor, state that the odometer mileage indicated on the vehicle described below is *Unknown* miles.

In addition he checked:

> I further state that the actual mileage differs from the odometer reading for reasons other than odometer calibration error and that the actual mileage is unknown.

Suits subsequently sued, claiming that Little Motor had violated the disclosure provisions of the Act,[3] and moved for summary judgment. The magistrate specifically found that Little Motor had intended to defraud and recommended judgment for Suits. The district court, however, concluding that a genuine issue of material fact existed, rejected the recommendation. Trial ensued. Ruling that a conflict in substantial evidence existed on the question of Little Motor's intent to defraud, a prerequisite to the imposition of civil liability under the Act,[4] the court denied Suits' motions

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[2]This was the explanation Little gave at trial for failing to disclose to Suits mileage of 100.073. He also testified that he was not sure that the papers ever arrived. However, in opposing Suits' motion for summary judgment before the magistrate, Little gave a sworn statement that he had misplaced the mileage disclosure form he had obtained from Leiphart at the time Suits purchased the car.

[3]Suits also alleged truth-in-lending violations under 15 U.S.C. §140. allegations on which she ultimately prevailed and which are not appealed.

[4]*Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980); *Pepp v. Superior Pontiac GMC, Inc.*, 412 F.Supp. 1053 (E.D.La. 1976).

for a directed verdict, and, after an unfavorable jury verdict, for judgment notwithstanding the verdict. Because we determine that there was not substantial evidence favoring Little Motor on this issue, *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), we conclude that the court erred in denying Suits' motions. Consequently we reverse.

15 U.S.C. §1988(a) requires:

> any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:
>
> (1) Disclosure of the cumulative mileage registered on the odometer.
>
> (2) Disclosure that the actual mileage is unknown, if the odometer reading is known to thetransferor to be different from the number of miles the vehicle has actually traveled.
>
> Such rules shall prescribe the manner in which the information shall be disclosed under this section and in which such information shall be retained.

Section 1988(b) further provides:

> (b) It shall be a violation of this section for any transferor to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure required by such rules.

This circuit has ruled on a transferor's obligations under the Act where the transferror had constructive knowledge that actual mileage exceeds recorded mileage, *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978);[5] *Leach v. Bishop Brothers Auto Auction*, 624 F.2d 34 (5th Cir. 1980). Appellee here urges that the latter case, holding that a transferor who has received notice that the car's odometer

[5]In *Nieto* we held that such transferor, where he does not know actual mileage, must indicate that actual mileage is unknown.

has probably turned over has an obligation to indicate to the purchaser that mileage is unknown, controls and compels affirmance. We disagree. A pivotal factual difference distinguishes this case. In *Leach,* Bishop Brothers had provided Leach with an odometer disclosure form indicating mileage of 34,194 miles despite the fact that ten days earlier when Bishop purchased the car, he was advised by that seller that " 'although the previous owner had executed an odometer disclosure form indicated that the odometer reading was 33,796 miles, it was my understanding that the car more than likely had 134,177 actual miles.' " 624 F.2d at 35. Thus, a transferor two steps removed in the chain of ownership had indicated to Bishop that the odometer had *probably* turned over. In contrast, here Leiphart gave Little Motor a disclosure form *certifying* actual mileage of 100,073, and Donald Little testified at trial that at the time he sold the car to Suits, he knew that the odometer had turned over.[6] Little may not therefore escape liability by claiming compliance with the duty articulated in *Leach,* a duty that did not pertain to a transfer with actual knowledge that the odometer had turned over.

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[6]Little's stated reason for failing to disclose this fact was that the buyer of a ten-year-old car with an odometer reading of 73 miles knows the odometer has turned over. This does not necessarily follow even though Little checked the statement indicating that odometer calibration error was not responsible for the disparity between actual mileage and the odometer reading. A buyer provided such disclosure might conclude that the seller was unsure as to whether the odometer had turned over or had even turned back. Since, in the latter case, it could have been turned back, for example, from 10,073 to 73 miles, this would still leave a wide range in the beliefs the buyer could form as to the vehicle's actual mileage. (In the more typical case, where the odometer reading showed a larger figure, the buyer might conclude that the seller was uncertain as to whether the odometer had been turned back, had turned over, or showed actual (though unusually low) mileage.)

While these facts sufficiently evidence fraudulent intent under §1989(a),[7] Little's business practices buttress the conclusion[8] that Little intended to defraud. The car dealer's common practice, as he testified, was to sell the car prior to receiving the papers and thus indicate that the vehicle's true mileage was unknown. Obvious steps would have assured his possession of the previous transferor's mileage disclosure form at the time he sold a car: he could have physically taken the disclosure form with him along with the car at the time of purchase, instead of arranging to have the statement mailed, or he could have waited to place the car for sale until the papers arrived by mail. Either course would have precluded an excuse for failing to provide potential customers accurate information. In our judgment Congress did not intend the Act to allow car dealers to operate in the manner Little did; such behavior manifests a clear intent to defraud. Consequently, viewing the evidence in the light most favorable to appellee, we believe that "the facts and inferences point[ed] so strongly in favor" of appellant that reasonable men and women could not have found against her. *Boeing Co. v. Shipman,* 411 F.2d at 374. The court below thus erred in denying Suits' motions.

---

[7]Section 1989(a) provides:

> (a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of—
>
> (1) three times the amount of actual damages sustained or $1,500, whichever is the greater; and
>
> (2) in the case of any successful action to enforce the forgoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

[8]Fraudulent intent to defraud may be inferred. *Pepp v. Superior Pontiac GMC, Inc.*

In a thorough and well-reasoned opinion, *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979), the Fourth Circuit confronted the precise situation before us: a transferor with actual knowledge that the odometer had "turned over" indicated mileage as unknown. The court held:

> When a transferor who knows that an odometer has "turned over" merely records the numbers appearing on the odometer and certifies that the true mileage is unknown, the consumer is not simply deprived of accurate mileage information; he is actually misled by the form itself. We cannot believe that Congress intended to enact a statute requiring that consumers be given false or misleading information.[9] (footnote supplied)

592 F.2d at 760. We agree with this reasoning. Therefore, we hold, as did the Fourth Circuit,[10] that where as here a transferor has actual notice that the odometer has turned over after registering 99,999 miles, he must disclose that

---

[9]The *Ryan* court stated that "any other application of § 1988" to the case of an odometer turning over is absurd and noted:

> [A]lthough a literal reading of § 1988(a) could *require* the transferor to state that the actual mileage is unknown when he knows that the true mileage exceeds the figures appearing on the odometer by 100,000 miles, "[f]orcing him to state that the actual mileage was 'unknown' . . . would require him to violate § 1988(b), which makes it unlawful 'to knowingly give . . . a false statement to the transferee in making any disclosure . . .' " (quoting *rider Oldsmobile, Inc. v. Wright*, 415 F.Supp. 258, 263 (M.D.Pa.1976); emphasis in original).

592 F.2d at 761, n.7.

[10]The *Ryan* court also stated:

> The requirement imposed by § 1988(a) is simple. Every person purchasing a car must be given a written statement of the vehicle's mileage if it is known. 592 F.2d at 760.

actual mileage is 100,000 miles plus the figure shown on the odometer.[11] Because Little knew actual mileage was 100,073 miles and did not so indicate, as a matter of law he evidenced an intent to defraud.

Accordingly, the judgment is REVERSED and the case is REMANDED for a determination of damages and the award of costs and attorney fees.[12]

---

[11]At trial Little testified that one of his reasons for failing to indicate that actual mileage equaled 100,073 miles was the possibility that the vehicle's odometer had turned over more than once and, therefore, that actual mileage was 200,073, or 300,073 miles. In the event that a transferor knows that an odometer has turned over once and has reason to believe it has turned over more than once, he should indicate that actual mileage is unknown but a minimum of 100,000 miles plus the figure shown by the odometer. Since Little had no reason to believe that the odometer had turned over more than once, however, this requirement would not apply in the instant case.

[12]Section 1989(a) sets out the standards to be applied relating to damages, costs, and attorney fees. *See* footnote 7 *supra*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RRENDA LEE SUITS	:	
	:	
vs.	:	CIVIL NO. C77-1628A
	:	
LITTLE MOTOR COMPANY	:	

ORDER

This action brought pursuant to the odometer disclosure provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 *et seq.*, is before the court on plaintiff's motion for judgment notwithstanding the verdict or for a new trial. Plaintiff bases her motion for judgment notwithstanding the verdict on the grounds that the judgment is contrary to law and is insufficient to support the verdict and judgment entered.

The correct legal standard for a judgment notwithstanding the verdict was stated by the Fifth Circuit Court of Appeals in the case of *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969). The court stated that "[o]n motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the nonmover's case—but in the

light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment reach different conclusions, the motions should be denied, and the case submitted to the jury." *Id.* at 374.

Applying that standard, the court finds that a conflict in substantial evidence was demonstrated at trial, which created a question for the jury as to any intent to defraud on the part of defendant. Plaintiff contends that the court misunderstood the proper legal standard to be applied in odometer disclosure cases. After review of the authority relied on and of the evidence presented, the court finds that under the specific factual situation presented by this case, a clear jury question was presented as to the defendant's intent to defraud. Accordingly, the court finds that plaintiff's motion for a judgment notwithstanding the verdict brought pursuant to rule 50(b) of the Federal Rules of Civil Procedure should be and is hereby denied.

In the alternative plaintiff moves for a new trial on the grounds that the result is against the clear weight of the evidence and would result in a miscarriage of justice if allowed to stand. Whereas, in passing on a motion for judgment notwithstanding the verdict, the court does not exercise its discretion but instead decides a pure question of law, when entertaining a motion for a new trial, the court may and should exercise sound discretion, which will not be reviewed in an appellate court in the absence of clear abuse thereof. A trial judge, on a motion for new trial, may set aside

the verdict if, in his opinion, it is against the clear weight of the evidence or will result in a miscarriage of justice. *See United States v. Bucon Construction Co.*, 430 F.2d 420 (5th Cir. 1970). The judge may so exercise his discretion even though there exists substantial evidence which would prevent the directing of a verdict or the granting of judgment notwithstanding the verdict. After review and due consideration, the court finds that the decision rendered by the jury was not against the clear weight of the evidence. In addition, after reviewing the factual situation presented by this this action, the court finds that the outcome in no way resulted in a miscarriage of justice. For the above-stated reasons, therefore, plaintiff's motion for a new trial is hereby denied.

IT IS SO ORDERED this 10th day of September, 1979.

/s/ William C. O'Kelley

WILLIAM C. O'KELLEY
United States District Judge

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No. 81-86

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Petitioner,

versus

BRENDA LEE SUITS,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

---

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Where the Fifth Circuit Court of Appeals explicitly adopts the holding of the Fourth Circuit Court of Appeals in *Ryan v. Edwards*, 592 F.2d 756 (1979) and there is no conflict between the circuits should this Court grant the petition for writ of certiorari solely to re-weigh the evidence?

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NO. 81-86

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LITTLE MOTOR COMPANY,
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On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This case involves 15 U.S.C. §1981 *et seq.* On June 14, 1977, respondent bought a car from petitioner. The

vehicle's odometer showed 73 miles. Ten days earlier petitioner had purchased the car from Leiphart Chevrolet. At that time Leiphart had explicitly disclosed to petitioner that the odometer had 100,073 miles.

Following his customer practice, petitioner sold the car prior to receiving the odometer form in the mail. Despite knowing that the odometer had turned over, he made the following disclosure:

> I, Little Motor, state the odometer mileage indicated on the vehicle described below is Unknown miles.

He also checked:

> I further state the actual mileage differs from the odometer reading for reasons other than odometer calibration error and that the actual mileage is unknown.

Respondent brought suit under the Act and moved for summary judgment. The Magistrate recommended judgment for respondent. The district court rejected the recommendation. Trial ensued.

At trial respondent moved for directed verdict and jnov. The motions were denied. Respondent appealed and the Fifth Circuit reversed under the *Boeing Co. V. Shipman*, 411 F.2d 365 (5th Cir. 1969) standard. In reversing, the Fifth Circuit explicitly followed the

Fourth Circuit's holding in *Ryan v. Edwards*, 592 F.2d 756. (All facts herein are taken from the Fifth Circuit opinion.)

SUMMARY OF ARGUMENT

I.

The Fifth Circuit in this case specifically adopted the holding of the Fourth Circuit in *Ryan v. Edwards*, 592 F.2d 756 (1979). There is no conflict between the Circuits in enunciating the proper legal standards. At best, petitioner's argument amounts to a belief that the Fifth Circuit misapplied the correct legal theory to the facts. This Court should decline the invitation to reweigh facts in a matter of importance only to the parties involved.

ARGUMENT

I.

The Decision Of The Fifth Circuit Explicitly Adopts The Standards Set Out By The Fourth Circuit And This Court Should Not Grant Certiorari To Review The Evidence And Facts Of This Specific Case.

In *United States v. Johnston*, 268 U.S. 200, 227 (1925) this Court noted "We do not grant certiorari to review

evidence and discuss specific facts." *See generally Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 111-113 (1959) (dissent); *ibid.* 361 U.S. 107, 11 (1959) (dissent); *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 537 (1956) (dissent). The reason, of course, is that the results do not matter to the public but only to the parties involved. *Sentilles, supra* at 112. For this reason, this Court should decline petitioner's request (page 4 of its brief) to review the evidence.

To the extent that petitioner is seeking to have this Court review the appropriateness of the *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) standard review should be denied. Petitioner has shown no split in the various Circuits in their handling of the JNOV standards, *see Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1212 (3rd Cir. 1970); *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975). *McCue v. Norwich Pharmacal Co.*, 453 F.2d 1033 (1st Cir. 1972); *Alley v. Dodge Hotel*, 551 F.2d 442 (D.C. Cir. 1977); *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978); *United Cal. Bank v. THC Financial Corp.*, 557 F.2d 1351 (9th Cir. 1977); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (10th Cir. 1978), *see generally Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943) and respondent knows of none.

This Court is thus left with the allegation that the Fifth Circuit's decision is somehow in conflict with that of the Fourth Circuit in *Ryan v. Edwards*, 592 F.2d 756 (1979). It should be noted that a *Ryan* charge was

presented to the trial court which the trial court refused to give (Record to the Court of Appeals at R. 131). Indeed, during closing argument counsel for the petitioner argued:

> All right, this in itself is a violation really because the odometer doesn't show 100073. It just shows 000073.

(Trial Transcript. T. 78).

When counsel for Ms. Suits objected based on *Ryan v. Edwards*, the objection was overruled. (T. 78-79). Thus, at all times Ms. Suits has been arguing that *Ryan v. Edwards* did control. This is exactly what the Fifth Circuit said in following *Ryan*. Petitioner attempts to distinguish the fraud surrounding the *Ryan* case from the fraud involved in the instant case. But petitioner draws a distinction without a difference.

To begin with, the previous owner of the car told Donald Little that the mileage was 100,073 miles. Despite that knowledge and the fact that he later testified that at the time he sold the car that he knew the odometer had turned over, Donald Little affirmatively misstated that the mileage on the odometer was unknown. (These facts are taken from the Court of Appeals opinion at page 4(a)).

This is where the *Ryan*'s opinion comes in. The Fourth Circuit, 592 F.2d at 760 said:

> When a transferor who knows that an odometer has 'turned over' merely records the numbers appearing on the odometer and certifies that the true mileage is unknown, the consumer is not simply deprived of accurate information, he is actually misled by the form itself. We cannot belive that Congress intended to enact a statute requiring that consumers be given false or misleading information.

Indeed, the holding, 592 F.2d at 760-761 is even more explicit:

> We hold when a transferor knows that a vehicle's odometer has 'turned over' after registering 99,999 miles, the 'cumulative mileage' which must be stated to satisfy the requirements of §1988(a)(1) is the total of 100,000 plus the number actually appearing on the odometer. **A transferor may certify the mileage as 'unknown' §1988(a)(2),[1], only when he believes that for some other reason the odometer reading is inaccurate.[2]** (emphasis added).

1/ The two statutes cited appear in their entirety at 3(a) of the petitioner's brief.

2/ It should be noted that this interpretation concurs with interpretation of the Secretary of Transportation which has been effective since January 1, 1978. 592 F.2d at 761 fn. 6. Even if there was a conflict which respondent denies, certiorari should still be denied. Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV.L.REV. 465, 466-467 (1953).

This holding is exactly the holding of the Fifth Circuit in this case. (See the first page and page 6(a) of the petitioner's appendix.)

Moreover, as the Court noted (as quoted at 3(a)), there were additional factors which showed a clear intent to defraud. The instant petitioner maintained business practices which guaranteed such an intent. As the Fifth Circuit noted, "In our judgment Congress did not intend the Act to allow car dealers to operate in the manner Little did, such behavior manifests a clear intent to defraud." *See generally Nieto v. Pence*, 578 F.2d 640 fn. 3 (5th Cir. 1978); *Jones v. Fenton Ford, Inc.*, 427 F.Supp. 1328 (D. Conn. 1977).

Thus, the Fifth Circuit is completely in accord with the Fourth Circuit and there is no reason for this Court to grant the petition for certiorari.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should not be granted to review the Judgment of the United Stated Court of Appeals for the Fifth Circuit.

September _____, 1981

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the below listed counsel of record has been served with three copies of the enclosed brief by depositing the briefs in the United States mail on the _____day of September, 1981, in a postage-paid envelope and addressing the envelope to the counsel listed.

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